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Brief of Phelps for Appellee

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Supreme Court of the United States.

OCTOBER TERM, 1897.

No. 341.

THE UNITED STATES, COMPLAINANT-APPELLANT,

vs.

THE JOINT TRAFFIC ASSOCIATION AND OTHERS.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Brief for the New York Central and Hudson River Railroad Company, one of the Defendants.

E. J. PHELPS,
Of Counsel.

Supreme Court of the United States,

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THE UNITED STATES, Appellant, vs. THE JOINT TRAFFIC ASSOCIATION and others.	No. 341.

Brief for the New York Central and Hudson River Railroad Company, one of the defendants in error.

Statement.

This case stands upon bill and answers, the answers not being traversed.

The defendants in error are thirty-one railroad companies, whose names will be found in the record, (*page* 1).

The Joint Traffic Association, named as a defendant, is a voluntary association of the other defendants, formed under the articles of organization hereinafter mentioned, not incorporated, and not capable of being a party to a suit.

The bill charges in substance, that the defendants on the 19th November, 1895, organized themselves into an association by an agreement in writing of

that date (hereinafter called the Agreement), severally executed by each of them for purposes therein mentioned, having its principal place of business in the City of New York, and elected the various officers required by said articles. That they are preparing to put into full operation the provisions of the Agreement, and are holding meetings for that purpose. That the defendants were prior to the Agreement common carriers of freight and passengers on their respective lines, between various States and Territories, and in open and active competition with each other. And that the Agreement, a copy of which is annexed to the bill, is an unlawful agreement in restraint of trade and commerce, and intended to terminate competition between the parties to it by unlawfully pooling or combining their business, and attempting to monopolize a part thereof, and by conferring upon the managers of the association power to establish rates, fares and charges for such business, and to determine, when in their judgment necessary, the division thereof among the members.

The prayer is that the defendants be enjoined from continuing in the Agreement, and from operating their roads thereunder, or in respect to any of the provisions thereof. (*Record, pp.* 1–141.)

An amendment to the bill was filed on the 9th of March, 1896, setting forth in substance that the Interstate Commerce Commission, before the commencement of the suit, requested the Attorney-General of the United States to direct the United States District Attorney for the Southern District of New York to institute the suit, and that the Attorney-General did thereupon direct the said United States District Attorney to institute all necessary proceedings to prevent the Agreement from being carried into effect, and to have it declared null and void, both as a violation of the Interstate Commerce Act, and of the Anti-Trust Act (so called) of July 2, 1890. (*Record, fols.* 142–147.)

All the defendants answered the bill.

The several answers of the Joint Traffic Associa-

tion, the New York Central and Hudson River Railroad Company, the Lake Shore and Michigan Southern Railway Company, and the Lehigh Valley Railroad Company, and the joint answer of the Pennsylvania Railroad Company and eight other companies, defendants, are printed in the record (*fols.* 184 *to* 618). And it is stipulated in the record that the remaining defendants filed several answers identical in form and effect with that of the New York Central and Hudson River Railroad Company, and which are agreed to be omitted in the printing (*fols.* 620-629).

The answers are substantially similar in their denials, averments and legal effect, and set up the same defences.

They admit the incorporation of the various defendants as common carriers, and that they form several systems or lines that are in competition with each other in interstate transportation. That they have executed the Agreement, of which a copy is annexed to the bill, have organized under it in accordance with its terms, and propose and intend to carry it out according to its true intent and meaning, and not otherwise. And (by amendments to the answers) they admit that the Interstate Commerce Commission ordered a copy of the Agreement to be sent to the Attorney-General of the United States. That afterwards and before the commencement of this suit, the chairman of that commission addressed to the Attorney-General a letter, of which a copy is set forth (*fols.* 264 *to* 266), but whether by authority of the Commission the defendants do not know and are not informed

They deny all the other facts and inferences of fact set forth in the bill. And especially deny all the various unlawful intentions and purposes which are charged against them in the bill, and all intentions and purposes except those expressed in the Agreement itself. They deny that any such unlawful intentions as are charged, are expressed in or are fairly to be deduced from the Agreement. And they

insist that the Agreement is not in any respect unlawful, or in violation of any statute of the United States.

They further state the true intent and object of the formation of the Traffic Association, what it is intended to effect, in what manner, and for what reason. And state the facts which show that these purposes are beneficial to the public, and in no respect unlawful. And they answering say, that such an association and agreement have become and are necessary to the proper discharge of the duties imposed upon the companies by their charters, as well as to the maintenance of those just and reasonble rates without which the roads cannot be operated. And they state fully and explicitly the facts and circumstances which render the Agreement indispensably necessary to those ends.

They deny that this suit was instituted at the request of the Interstate Commerce Commission, unless the letter of the President of the Commission above referred to amounts to such a request, which they deny. Or that said Commission ever took any other action in the premises, or made any order or report therein, as required by law, or gave the defendants any notice or opportunity to be heard in respect thereof.

The defendants further insist, that the grounds of relief attempted to be set up in the bill are distinct and separate, and cannot be united in the same suit. That the complainants are not entitled to maintain the suit upon the mere general allegations which the bill contains, without specifying the statute claimed to be infringed, and the particulars in which it is claimed to be violated. Nor on the mere allegation that the Agreement is in violation of the rights of citizens of the United States. And claim the same benefit of these objections as if they were taken by demurrer.

The case was heard in the United States Circuit Court for the Southern District of New York, where the bill was dismissed. That judg-

ment was affirmed on appeal and on hearing, by the Circuit Court of Appeals in the Second Circuit, from which decision this appeal is taken by the Government. (*Record, fols.* 631-650, 670-674, 233-234, 241-250.)

There are fourteen assignments of error, which only set forth in substance the failure of the Circuit Court of Appeals to sustain the bill, and to grant the relief therein prayed.

POINTS.

First Point.—As the case is set down for hearing on bill and answers, no fact alleged in the bill can be taken as true if denied in the answers, and every fact alleged in the answers must be taken to be true if responsive to the bill.

The facts on which the case stands are therefore to be found exclusively in the answers, either in the admissions or in the responsive averments which they contain.

Second Point.—The denials in the answers, as above pointed out, completely negative all the charges of illegal intent on the part of the defendants which are contained in the bill, unless they are found to result necessarily from the terms of the agreement itself.

The actual intention of the parties to the Agreement is a fact, not a conclusion of law, except so far as it is the necessary result of the language employed; and is the controlling fact where the decree sought is an injunction. It may well be charged in

the bill, and perhaps is charged, that the parties have an actual illegal intent not necessarily to be inferred from the language, and for which the agreement is really a cover. This is an averment of a fact, and being denied in the answers the denial prevails, since the answers are not traversed. And the complainant's case is thenceforth restricted to the intent which is the necessary inference from the terms of the agreement, and not open to be contradicted by parol evidence.

In other words, to quote from the brief of the Government in the Court below, "*the complainant's whole case is the contract.*" The case is therefore on the question of the unlawfulness of the acts sought to be enjoined, reduced by the record to the single question, whether the Agreement *on the face of it* violates the Federal law.

Third Point.—Whether the Agreement by its terms violates the Federal law, depends entirely on the enquiry whether it conflicts with any statute of the United States.

The bill is not based upon any statute, but proceeds apparently upon common law grounds. No statute is referred to, or charged to have been violated.

The United States has no common law.

"The United States as such can have no common law. It derives its powers from the grant of the people made by the Constitution, and they are all to be found in the written law, and not elsewhere. It must therefore find its power to punish crimes, in laws of Congress passed in pursuance of the Constitution, defining the offences, and prescribing what courts shall have jurisdiction over them. No act can be a crime against the United States which is

not made or recognized as such by Federal constitution, law or treaty."

Cooley's Principles of Cons. Law, p. 138.

See also

Wheaton v. *Peters*, 8 *Pet.*, 591.
United States v. *Hudson*, 7 *Cranch*, 32.
Bucher v. *Cheshire R. Co.*, 125 *U. S.*, 555.

This case must, therefore, in order to succeed, be brought within the prohibition of some act of Congress which creates the offense, and confers the jurisdiction.

Fourth Point.—The only statutes of the United States that are claimed to be infringed by the terms of the Agreement, are the "Interstate Commerce Act," of February 4, 1887, amended by acts of March 2, 1889—February 10, 1891, and February 8, 1895, and the Anti-Trust Act of July 2, 1890.

Whether these statutes, or either of them, if infringed, confer upon the Court the power to grant the relief here sought, upon the facts disclosed by the record, and whether this bill is so framed as to admit of the exercise of that power in the present case, are questions that will be discussed later.

We consider first the enquiry, whether upon those facts, either of the statutes have been or are intended to be violated.

Fifth Point.—The Agreement violates no provision of the Interstate Commerce Act.

The only provision in that Act that is claimed to be infringed, is contained in *Sec.* 5, which prohibits "*pooling.*"

And there is no clause in the Agreement in which any infringement of this section is suggested, except *Article* 8, which provides as follows:

"The managers are charged with the duty of securing to each company party hereto, equitable proportions of the competitive traffic covered by this agreement, *so far as can be legally done*."

This article is not in conflict with *Sec.* 5 of the statute.

I.—"Pooling" means a division of the money earnings of traffic, which this article does not contemplate.

Such is the obvious meaning of the language. The words "pooling of freights" and "dividing the proceeds of the earnings" refer to the same thing; the latter is a definition of the former, or the expression of the same idea in different words, rendered necessary because the word "pooling" is a new word, without legal significance, and its general meaning is very uncertain. Both expressions are therefore employed in order to make the intention clear.

The word "freights" is used in the Act as referring to the earnings for carrying goods (*Sec.* 20), while the word "freight" in the singular is used to express the property carried (*Sec.* 6); such is also the ordinary meaning of the terms. The language of the Act is hence to be regarded as prohibiting not two different things, but one thing.

Or perhaps as prohibiting in one form of words the agreement to pool, and in the other the act of pooling, which might take place without agreement. The former, being a continuous act, is visited with a continuous penalty.

II.—This intention of the Act becomes still more clear, when resort is had to the supposed mischief against which it is claimed to be directed.

The pooling of earnings was considerably practiced, and was very much, though probably very unjustly, complained of. It was very easy of accomplishment, as it was purely a money transaction.

A division of freight carried, on the other hand, was rarely complained of. It could only be done to a very limited extent, and it is impossible to see how it should do any harm.

Putting freight consigned to different competing roads into a common stock is usually nearly impossible. Each has, almost always, its separate station, and to transfer freight thence to another road would cost as much as to transport it; and would violate the contract of consignment under which it was received. For when freight passes over successive roads forming a continuous route, it must still follow the consignment given to it by the shipper, in determining the roads over which it shall go.

Only in those rare cases, in which it reaches an intermediate point from which there are competing roads having the same station house, with no directions as to which road the freight shall take, would a division of it among them be practicable.

But what possible harm to the shipper who has given no other direction, could that do? The rates of carriage are not increased, and his freight reaches its destination by a route immaterial to him, and at the same cost.

It is not to be presumed, until clearly shown, that it is the intention of the Act to make that penal which is either innocent, or virtually impracticable.

III.—But this discussion is really unnecessary, even though a division of the freight itself is intended to be prohibited, since *Article 8* of the Agreement provides for no such thing. Its language is indefinite, and perhaps ambiguous, as clauses inserted in contracts in order to reconcile conflicting and uncertain ideas among numerous parties, are apt to be.

But ambiguity of expression does not justify the inference of a criminal intent. The presumption is the other way. And the criminal intent must affirmatively appear.

No definition or criterion is given in *Article 8* by which it can be ascertained what are "equitable proportions of traffic." No means are indicated by which they can be brought about. No penalty for a failure to effect them is provided. The whole vague proposal is left to the unrestricted discretion of the managers.

They are charged with the "duty" of doing something that is not defined, by some means not stated, and with no consequences, if they omit to do it all. This cannot be brought within a penal statute by the gratuitous suggestion, without proof and against the record, that possibly these managers may conclude to discharge this "duty" by criminal means.

IV.—But what is conclusive in respect to the effect of this article in the only particular material to this branch of the case, the violation of the Interstate Commerce Act, is its concluding language: "*so far as can be legally done.*"

And likewise the express provision of Section 3 of Article 7: "The powers conferred upon the manager shall be so construed and exercised *as not to permit violation of the Interstate Commerce Act, or any other law applicable to the premises, or any provision of the charters or the laws applicable to any of the companies parties hereto.*"

Whatever else the article means, action under it is limited by these restrictions to such steps as can be taken in conformity with law. There are various means that might be lawfully employed for the accomplishment of the object referred to, such, for instance, as the allowance of "differentials" in certain cases, whereby a carrier might be allowed to charge a lower rate than that established. And the very ambiguity of the statute may probably have

suggested the provision in this article, that the managers should go as far in the direction indicated, if found necessary, as it should be ascertained that the law allowed.

In order, therefore, to make out of this article an infringement of the statute, it will be necessary to reverse the explicit meaning of its language, and to substitute for the concluding and controlling words it contains, these: "*whether it can be legally done or not*, and *whether it violates the express provisions of this Agreement or not*."

And to hold that an agreement not to violate the law, in and of itself and *by its terms* infringes the law to which it refers. This, too, under a penal statute, and against the presumption of lawful intent that the Agreement is entitled to until the contrary appears, even though it contained no assurance on the subject.

And against the denials of unlawful intent on the record, which under the pleadings are not open to question.

V.—The argument on the part of the Government, and the cases cited in support of it, relating to the effect of the words quoted from *Article 8*, have no application to the case.

It may be conceded that an agreement to do an unlawful thing cannot be made lawful by the insertion of a saving clause, declaring that no law is to be violated. Because the thing provided to be done is in itself and necessarily a violation of law. But in this article no means are indicated by which its purpose is to be effected, if it is to be effected at all. It may certainly be done by legal means, though it might possibly be done illegally. But illegal means are absolutely excluded by the language, which restricts the managers to the employment of lawful means only, if they employ any.

Sixth Point.—Even assuming that this clause in the Agreement can be construed into a violation of the 5th section of the Interstate Commerce Act, this suit would not be maintainable, because it is unauthorized by that Act, and precluded by its express provisions.

I.—This Court has no power to grant an injunction, either interlocutory or upon final decree, at the suit of the United States Government, against the commission of a crime, where no other grounds for the injunction exist except that the act sought to be enjoined is an offense; unless such power is specially conferred by statute.

And especially where, as in this case, the Government has no interest of its own that is in danger of being affected.

Such a power is not conferred by any general statute of the United States.

Nor does it come within the general equity jurisdiction of the Court, since an injunction of that character is unknown in equity jurisprudence.

U. S. v. *Debs*, 158 *U. S.*, 1.

II.—No power to grant an injunction against a "pooling" contract is conferred upon the Court by the Interstate Commerce Act.

Pooling is simply made criminal and punishable by fine (Sec. 14).

In two other cases of very different character arising under this act, the power to grant injunctions is specially given to the United States Circuit Court, but only at the suit of the Interstate Commerce Commissioners.

One of these is found in the 6th Section, which authorizes an injunction against a carrier to restrain him from any interstate transportation, when he has neglected or refused to comply with the pro-

visions of that section in respect to filing and publishing schedules of rates.

The other is in the 16th Section, which provides that an injunction may be granted on the application of the Commissioners to restrain a carrier from continuing the violation of any order or requirement of the Commissioners, and enjoining obedience to the same.

The Act contains no other provision for an injunction in any case arising under it, or for the infringement of any of its provisions.

III.—The Interstate Commerce Act does not authorize the commencement *of any suit* until an enquiry and decision of the Commissioners has first taken place, which in this case has not taken place.

By the 12th Section it is made the duty of United States District Attorneys, upon the request of the Commissioners, to institute in the proper court and to prosecute, "*all necessary proceedings for the enforcement of the provisions of the Act, and for the punishment of all violations thereof.*"

But a reference to the context, and to the elaborate provisions contained in the Act for enforcing its requirements and punishing its violation, shows that the "necessary proceedings" referred to in the 12th Section are those which *the Act* makes necessary and designates. And a careful reading of the whole Act discloses that it contains a complete and consistent system of remedial procedure, which excludes the idea that the Courts can be invoked, except in aid of it.

The Commission created by the Act is "*authorized and required to execute and enforce the provisions of this Act.*" It is empowered to adopt its own rules and system of procedure, and to sit anywhere in the United States, all its expenses being defrayed. It is invested with extraordinary and *quasi* judicial powers for compelling the attendance of parties and witnesses, and the production of

"*books, papers, tariffs, contracts, agreements and documents*" from any part of the country, upon the complaint of any aggrieved party, of any State Railroad Commissioner, or on its own motion. It is required to hear and investigate every case and complaint arising from anything done or omitted to be done in violation of the provisions of the Acts, to decide the case and to make any necessary or proper order in respect to it, and to make report thereof and of the findings of fact on which it is based, which report shall be entered of record, and a copy furnished to each party.

But *in aid* of this jurisdiction of the Commissioners, the power of the Federal Courts may be invoked. In case of a disobedience of a subpœna either to attend or to produce papers, the Court may make the necessary order and punish as a contempt the failure to obey it. If testimony by deposition is required, it may be taken before a Federal judge or officer, and attendance for that purpose compelled. And when an order or requirement which has been made by the Commissioners in any case shall be disobeyed, they may apply to the United States Court, which shall fix a time and place for summary trial, require the attendance of the party recusant, and proceed to a hearing, on which the findings of fact by the Commissioners shall be *prima facie* evidence. And if it is found that any lawful order of the Commissioners has been disobeyed, the Court (as before pointed out) may enforce it by injunction, prohibitive or mandatory, and compel observance of their order by severe penalties.

Violations of the Act are also made misdemeanors punishable by fine, upon prosecution in any United States District Court having jurisdiction.

These are therefore the "necessary proceedings" for the enforcement of the provisions of the Act, which the Commissioners are authorized to require the District Attorney to institute in the Federal courts, in aid of their own jurisdiction, not in the place of it.

For these, special power is in every instance conferred on the court by the Act, and no other power in the matter is given to the courts.

Not a word in the Act, except the clause above quoted, tends to support the contention that an original suit like the present may be brought in the Federal courts in the first instance. The very section in which the clause is found, shows by its subsequent language that the investigation it provides for is by the Commissioners and not by the courts. And every provision in the Act relating to remedies or enforcement supports this construction.

And if, as in this case, the "necessary proceeding" demanded is one that is not within the general jurisdiction of the court, and no special authority for it is given, then the court has no power to entertain it, and the remedy appealed to must be the complete remedy provided by the Act.

For it is impossible to maintain that a court is invested with unlimited power to do anything and everything not within its ordinary power or jurisdiction that the Commissioners may deem "necessary," merely by a clause that makes it the duty of the District Attorney, when requested, to institute in the court "necessary proceedings." Especially when the Act clearly shows what proceedings are referred to, and confers upon the court the power to entertain them.

It will be seen, upon an examination of this statute, that the original jurisdiction of the Commissioners in respect to its violation, aside from the criminal proceedings under it, and from the right of action given to injured parties, is intended to be exclusive, not concurrent. And that the jurisdiction of the Circuit Court, except so far as ancillary for certain special purposes, is in effect appellate.

The propriety and necessity of this conclusion will become apparent, when it is considered that if this were not so, the burden that might be thrown upon the Circuit Courts would be beyond their power

to discharge, with any regard to the interests of other suitors.

And when it is further considered, that cases under this Act involve much more than the issues of law and fact with which courts are usually charged, and require indispensably a familiarity with the intricate and far-reaching details of railroad management, which no court, unless devoted entirely to that purpose, can be expected to possess or to acquire.

And that these cases necessarily require also, the extraordinary powers for reaching persons and papers in other States, and for summary proceedings, which are conferred upon the Commissioners, and are not possessed by the courts.

Seventh Point.—The Anti-Trust Act of July 2, 1890, does not apply to the business of railway transportation.

It will be claimed that the decision of this Court in the case of the Trans-Missouri Association (166 *U. S.*, 290), is decisive upon this point, as well as upon the further question whether the Agreement here under consideration is a violation of the provisions of the Anti-Trust Act.

In respect to the latter question it will be found on comparison that very material differences exist between the agreement shown in that case, and the case that is presented here. So that the decision there is by no means controlling in the present case. These points of difference are clearly pointed out in the brief of Mr. Edmunds, and need not be restated.

But we conceive it not to be improper, so far as it may be necessary, respectfully to ask of the Court a reconsideration of the conclusions reached by the majority of the Judges in that decision, which overrules the judgment of six United States Circuit and District Judges who sat in the different stages of

that case and of this, and is opposed to the opinion of four members of this tribunal, and also overrules the decision of Mr. Justice Jackson in the case *In re Greene*, 52 *Fed. Rep.*, 109, which is directly in point.

Its consequences are far-reaching and disastrous. It deprives the citizens of this country of the right, never before questioned in an English or American court, of making a large class of just and reasonable contracts, often absolutely necessary to the use of property, the transaction of business, and the fair compensation of industry. The justice or the sound policy of such a result is not asserted. The decision turns upon the construction of the ambiguous language of an Act, which it is virtually conceded ought not, as so construed, to be the law. However correct and necessary as a matter of law this construction may be, its result has been received by the public with surprise and alarm.

The argument in opposition to it has been so fully, so clearly and so forcibly presented in the dissenting opinion of Mr. Justice WHITE, that it is hardly possible to add to it, nor is it necessary to repeat it. A summary only is here presented, of the general propositions of law relied on in support of the judgment of the court below, from which the appeal in the present case is taken.

I.—The intention of the statute, in respect to its application to this case, as shown by the great diversity of judicial opinion in respect to it, is doubtful.

This doubt must be solved by the ordinary rules of legal construction in such cases, which are likewise the rules of justice and good sense.

II.—These rules all tend toward one conclusion, the attainment of a construction that is *reasonable*,

in view not only of the language, but of the situation and existing circumstances that attended its passage; that is to say, "*the old law, the evil and the remedy.*"

These considerations control and determine the meaning of language that is ambiguous, and often when they create an ambiguity which upon the mere words might not exist.

Many decisions of this Court to this effect are cited by Mr. Justice WHITE, to which many more might be added.

III.—In the Anti-Trust Act the plain object is to reach and put down mischievous trusts in restraint of trade, and monopolies.

This is shown by the title, and by the whole context of the act. They cannot be read without perceiving at what it was aimed.

Two of its eight sections at least (*6 and 7*), though of expressed general application to all contracts reached by the act, could have no possible application to the contract in this case.

The collocation of the word "*contract*" wherever it occurs, either in the title or the body of the Act, with the words "*unlawful*," "*combination*," "*conspiracy*," "*monopoly*," shows clearly what description of contracts is referred it.

The purpose of the act was also of common knowledge and notoriety when it was passed and ever since. Monopolies and trusts which served to create them, had reached proportions which had greatly and justly excited public attention, and legislation against them was loudly called for. This was shown in the widespread discussion of that subject in Congress, in the press, and in public speeches.

Against this notorious evil there was no law of the United States.

Says Mr. Justice JACKSON in *In re Greene:* "We have not deemed it necessary or proper to attempt the difficult task of defining the cases to which the Act will apply. The enactment was manifestly aimed at the trust combinations and associations formed by individuals and corporations which the State courts have in most instances declared unlawful."

The whole subject of railway transportation, on the other hand, including especially the regulation of its rates, tariffs and charges, had been carefully and entirely covered and dealt with by the preceding Interstate Commerce Act, which contains every provision in respect to it which Congress thought needful, provides a complete system of remedies, restrictive, punitive and compensatory; constitutes an important tribunal to enforce them, armed with all necessary powers; and confers a special jurisdiction upon the United States Courts in aid of it.

By various successive amendments this system of regulation, procedure and remedy had been assiduously enlarged, until it covers every point requisite to be dealt with.

It is impossible to suppose that in the face of this existing law it was intended to include the business to which it relates, in the vague and general terms of a subsequent statute, passed for another and different purpose, and giving a different set of remedies and very different penalties, for the same transgression.

In such a case another well established rule of construction intervenes.

Where a special statute fully covers the subject to which it is addressed, and a subsequent general statute contains words that might, if standing alone, receive a construction broad enough to include the

same matter, the general will always give way to the special statute, and will be regarded as not intended to intrude upon its province, unless that intention is clearly manifested.

And especially will this construction be given, where, as in the present case, the statutes, if taken to relate to the same thing, would not only be superfluous but inconsistent.

Endlich on Stat., Secs. 113-137, 225.
Bishop on Written Law, Sec. 126.
Brewer v. *Blougher*, 14 Pet., 178.
Reicke v. *Smythe*, 13 Wall., 164.
Atkins v. *Disintegrating Co.*, 18 Wall., 472.
United States v. *Landers*, 22 Wall., 272.
Townsend v. *Little*, 109 U. S., 504.

If this were not so, and both these statutes are to be taken to apply to this subject, then they are *in pari materia*, and must be construed together. In that case the Anti Trust Act, which is the later, repeals all provisions in the Interstate Commerce Act which are inconsistent with it. A comparison of the two acts shows that these inconsistencies are extensive. And if the inconsistent provisions in the first are repealed, its efficiency is materially crippled, and the whole subject is thrown into confusion.

It is not to be believed that this result was intended.

Nor has it been so treated in the seven years that have since elapsed, by Congress, by this Court or any other, or by the Interstate Commerce Commission.

We have therefore on the one hand a great and manifest evil, demanding legislation, and against which none existed.

On the other, a system of established and extensive business, indispensable to the public accommodation, completely regulated and controlled by a

carefully devised and matured body of statute law which is specially full and effectual in the very particular which it is now claimed the Anti-Trust Act is designed to apply to, the protection of the public against unreasonable charges.

To what conclusion in respect to the purposes of this act does the criterion of "the old law, the evil and the remedy" conduct?

IV.--It is further to be observed on the question of the interpretation of this statute, that it is a penal act throughout, and must receive a strict construction. And this equally whether a remedy under it is invoked in a civil or in a criminal proceeding.

If the additional remedy by injunction is given by a statute which makes the act to be enjoined criminal and punishable, the statute does not for that reason cease to be penal. Nor can it be penal in one proceeding under it and not in another. That question depends on its character and purpose, not upon the form of the procedure.

Manifestly the act must receive the same construction in this suit that it would upon an indictment, for an agreement cannot be restrained which the act does not condemn.

The injunction which it authorizes is one that is unknown to equity jurisprudence, and rests entirely upon the statute. It is only ancillary to the other provisions, and therefore is in itself a penal remedy.

Says Chief Justice MARSHALL in *U. S.* v. *Wiltberger*, 5 *Wheat.*, 95: "The rule that penal laws are to be construed strictly is, perhaps, not much less old than construction itself."

And in *U. S.* v. *Morris*, 14 *Pet.*, 475, the Court remarked: "It has been long and well setted that such (penal) statutes must be construed strictly."

This rule of strict construction applies as well to questions that arise to the application of the act as to those that relate to the effect of its provisions.

In *Harrison* v. *Vose*, 9 *How.*, 378, this Court observed: "In the construction of a penal statute it is well settled also, that all reasonable doubts concerning its meaning ought to operate in favor of the respondent. * * * This principle of construction does not make an exception in the act not made by Congress, as is sometimes objected, but it recognized a limitation allowed or required by the act itself, in order to give to it what it must reasonably be supposed the Legislature designed, a natural and obvious intent."

In the case of *The Schooner Enterprise*, 1 *Paine*, 32, Judge Livingston says: "It should be a principle of every criminal code, and certainly belongs to ours, that no person be adjudged guilty of an offense, unless it be created and promulgated in terms which leave no reasonable doubt of its meaning. If it be the duty of a jury to acquit where such doubts exist concerning a fact, it is equally incumbent on a judge not to apply the law to a case where he labors under the same uncertainty as to the meaning of the Legislature. If this be involved in considerable difficulty from the use of language not perfectly intelligible, unusual circumspection becomes necessary, especially if the consequences be so penal as hardly to admit of aggravation. When the sense of a penal statute is obvious, consequences are to be disregarded; but if doubtful, they are to have their weight in its interpretation."

"Statutes creating crimes will not be extended by judicial interpretation to cases not plainly and unmistakably within their terms. If this rule is lost sight of, the courts may hold an act to be a crime when the Legislature never so intended. If there is a fair doubt whether the act charged in the indictment is embraced in the criminal prohibition, that doubt is to be resolved in favor of the accused."

Per DILLON, *J.*, in *U. S.* v. *Whittier*, 5 *Dill.*, 219.

See also among many other cases:

U. S. v. *Sheldon*, 2 *Wheat.*, 119.
U. S. v. *Hartwell*, 6 *Wall.*, 395.
U. S. v. *Shackleford*, 5 *Mason*, 445.
U. S. v. *Clayton*, 2 *Hill.*, 219.
U. S. v. *Garrettson*, 42 *Fed. Rep.*, 22.

In *Dwarris on Statutes*, 641, the author remarks: "In like manner in the revenue laws, where clauses inflicting pains and penalties are ambiguously or obscurely worded, the interpretation is ever in favor of the subject;" for this plain reason, says HEATH, *J.*, in *Hubbard* v. *Johnston*, 3 *Taunton*, 177, "that the Legislature is ever at hand to explain its own meaning, and to express more clearly what has been already expressed."

It can hardly be denied, that there is not merely a reasonable but a very grave doubt whether the terms of the Anti-Trust Act were intended to include contracts like the one here in question, when it is remembered that out of the sixteen Judges who in the trans-Missouri case and this case have heard the question argued, including (with Mr. Justice JACKSON), five members of this Court, ten were of the contrary opinion.

Would it not be well under these circumstances, before adopting a construction of a penal law that entails consequencs so serious and so unjust, to permit Congress to express its intention, if such be its intention, more clearly?

It is in the light of the purpose thus ascertained, and of these considerations and rules of construction, that the language of the Anti-Trust Act is to be viewed.

V.—But if any doubt could still exist on this point, it is completely set at rest by reference to the

proceedings of Congress in both Houses, on the passage of the Anti-Trust Act.

Cong. Record, Vol. II., Part I, *p.* 96, *Part* IV., *pp.* 3153-3857; *Part* V., *pp.* 4099, 4104, 4123, 4753, 4837; *Part* VI., *pp.* 5453, 5950, 5981; *Part* VII., *pp.* 6116, 6208, 6312.

From these it will be seen that the bill passed in the Senate originally in its present form; that the House adopted an amendment extending its provisions to the traffic agreements of railways; that the Senate amended this amendment so as to restrict it to agreements raising rates above what is just and reasonable; that in this amendment the House refused to concur; that a committee of conference of the two Houses recommended that the Senate amendment be accepted; that the House refused to adopt it, and adhered to its own amendment; that a second conference committee was appointed, and recommended that both Houses recede from their amendments, which report was adopted, and the original bill passed without amendment. The report of the first conference committee shows that it was clearly understood in both Houses that the original bill (the present bill) did not apply to railway contracts at all, and required an amendment if it was so to apply. And that the controversy between the two houses was, whether in extending it to such contracts it should make all restraint of competition illegal, or only such restraint as raised rates above what was reasonable and just.

The Supreme Court of the United States held in the case of *Blake* v. *Natl. Bank*, 23 *Wall.*, 307, that reference to the Congressional Journals may be had, on a question as to the meaning of the language in a statute, in order to ascertain by the amendments proposed, made or rejected, and by the reports of committees of conference, what the inten-

tion and understanding of Congress was. And the statute in that case was construed by the light thus obtained, which was held to be decisive.

See also to the same effect:

Gardner v. *Collector*, 6 *Wall.*, 511.
Holy Trin. Church v. *U. S.*, 143 *U. S.*, 465.

This is very different from a reference to the views and speeches of individual members, which, as it has been repeatedly decided by this Court, are not proper to be taken into consideration.

Aldridge v. *Williams*, 3 *How.*, 24.
U. S. v. *Pac. R. Co.*, 91 *U. S.*, 79.
Dis. of Col. v. *Wool Market*, 108 *U. S.*, 25.

Eighth Point.—Assuming for the purposes of the argument, that the Anti Trust Law does apply to railway traffic contracts, no provision of that law is violated by the Agreement now under consideration.

The prohibitions of the act are two:

I.—Against contracts, combinations or conspiracies in restraint of trade or commerce.

II.—The monopoly of, or the attempt or combination to monopolize any part of the trade or commerce of the States, or with foreign nations.

I.—The Agreement in this case is not "in restraint of trade or commerce."

The theory of the bill appears to be that the Agreement comes within this description, because it tends to restrict competition, and because any agreement that restrains competition is "in restraint

of trade." Both these assumptions are erroneous, the one in fact, the other in law.

The Agreement *does not* restrain competition to any such appreciable extent as would justify an injunction, except that competition which is unlawful because it is secret.

By the provisions of the Interstate Commerce Act, all carriers are required to print in large type and conspicuously post so as to make them accessible to the public, their rates, fares and charges, and to file copies thereof with the Commissioners, and to make no change in such rates except by ten days' public notice of an increase and three days of a reduction, to be given and filed with the Commissioners in the same manner. And are prohibited from demanding or receiving any greater or less rates than those thus published and in force at the time.

The mischief against which the Agreement is directed is not the change of the published rates in the manner so required. Because no company could gain any advantage over its rivals in that way, since any change thus publicly made would be immediately adopted in self-defense by all other competing rivals. But against the *secret* acceptance, through soliciting agents, of rates *lower than the existing published rates*, whereby business may be diverted from other roads which adhere to them. This is the destructive competition that railroads have to contend with, forbidden by law, opposed to all fair dealing, and yet heretofore inevitable.

For the repression of this illegal traffic, the Agreement abolishes the soliciting agencies through which it takes place, provides that no deviation from established rates shall be made by any company except *through resolution of its Board of Directors*, forwarded immediately to the managers of the traffic association, and not to take effect until thirty days after its receipt by them. And it is in such case made the duty of the managers to act promptly for the protection of the parties to the Agreement.

This can only be done by a general reduction of rates by all the parties to meet that which has taken place.

It is therefore the unlawful and illegitimate competition only, that in the practical and natural operation of the Agreement it tends to suppress. And that only by bringing it into the light of day, and compelling it to be done in a legal way, so that other companies can have a fair opportunity to meet it. In other words, by making competition a real competition open to all competitors, instead of a secret and dishonest advantage to be obtained by one over another. Is this not to the advantage of the public, as well as of the railroad companies?

It is true that by the terms of the Agreement the managers *may* make recommendations in respect to rates. They are not required to make them, and may never do so. But these, if made, are not binding upon the parties. They only agree either to comply with them, if affirmed in case of appeal by the Board of Control, or to pay a penalty which is insignificant in proportion to the business affected, and which is applied toward the expenses of the association. But any member upon thirty days' notice can withdraw from the Agreement.

This, it will be seen, does not result in any actual or probable restriction of competition in any quarter where it is reasonably to be looked for. And upon an application for an injunction the view that is to be taken of its operation in the future should be practical, and not merely theoretical.

The question is, is the act complained of a real and substantial and not merely a constructive violation of the penal law?

II.—Assuming again, against the fact, that a certain restriction of competition is the necessary result of this Agreement if it is allowed to proceed, it plainly appears by its terms to be only such re-

striction of competition as is necessary to secure "*just and reasonable rates.*"

By the Interstate Commerce Act all rates are required to be "reasonable and just." Every unjust and unreasonable charge is made unlawful. Schedules of rates, as has been pointed out, are required to be published and kept open to public inspection, and to be filed with the Commissioners; and not to be changed without due notice to the public and the Commissioners. Ample remedies, criminal and civil, are provided for the violation of these requirements, the enforcement of which is made the duty of the Commissioners. And the companies are also made subject to the State laws regulating rates.

It is justly to be presumed, therefore, that the published rates of the various members of the association existing when the Agreement went into effect, were just and reasonable, in conformity with law, and approved by the Commissioners. And there is no suggestion to the contrary.

The agreement provides that these schedules of rates are "*reaffirmed.*" That the recommendations of changes in them by the managers must be such as "*may be reasonable and just.*"

And it is further provided as follows:

Sec. 3. *Art.* 7. The powers conferred upon the managers shall be so construed and exercised *as not to permit violations of the Interstate Commerce Act, or any other law applicable to the premises,* or any provision of the charter or the laws applicable to any of the companies parties hereto, and the managers shall *co-operate with the Interstate Commerce Commission to secure stability and uniformity in the rates, fares, charges and rules established hereunder.*"

Hence, it becomes perfectly clear, that no changes of rates can take place consistently with the Agreement, except such as are reasonable and just, in

conformity with the Interstate Commerce Act, and approved by the Commissioners.

III.—The precise question, therefore, under this clause of the Anti-Trust Act, is whether a contract that produces a result which the Interstate Commerce Act in terms authorizes and provides for, and helps to repress a practice which that act forbids, is *for that reason* a contract for the unlawful restraint of trade.

Or, in other words, whether it can be made unlawful by a forced construction of the general provisions of one statute of the United States, for a carrier company to provide by a traffic contract for the maintenance of those "just and reasonable rates" which another statute of the United States not only authorizes, but creates elaborate means for making permanent, and for preventing the secret changes of rates which the Interstate Commerce Act prohibits.

It is the statutes themselves that have prescribed a definition of this clause of the Anti-Trust Act, so far as it applies to railway traffic contracts, if it is held to apply to them at all, whatever its meaning as to other contracts may be.

That the just and reasonable rates of transportation which the Interstate Commerce Act contemplates and provides for, are rates that are just and reasonable to the carriers as well as to the carried, cannot be open to doubt. The very words "just and reasonable" employed in that Act, necessarily imply that meaning. They are words of comparison and relation, and unless the rights of both parties to a contract are considered, there can be no comparison.

It would be preposterous to call a price just and reasonable, that was not so to one side as well as to the other.

This is the construction which this Court have given to the Interstate Commerce Act in this very particular.

In the case of *Texas & Pac. Ry.* v. *Interstate Com. Commission*, 162 *U. S.*, 197, Mr. Justice SHIRAS, in delivering the opinion of the Court, after an exhaustive review of the Interstate Commerce Act, says:

"The conclusions that we draw from the history and language of the act, and from the decisions of our own and the English courts, are mainly these: *That the purpose of the act is to promote and facilitate commerce by the adoption of regulations to make charges for transportation just and reasonable*, and to prohibit undue or unreasonable preferences or discriminations. That in passing upon questions arising under the act, the tribunal appointed to enforce its provisions, whether the Commission or the courts, is empowered to fully consider the circumstances and conditions that reasonably apply to the situation, and that in the exercise of its jurisdiction the tribunal may and should consider *the legitimate interests as well of the carrying companies as of the traders and shippers*, and in considering whether any particular locality is subjected to an undue preference or disadvantage, the welfare of the communities occupying the localities where the goods are delivered is to be considered, as well as that of the communities which are in the locality of the place of shipment. That among the circumstances and conditions to be considered "as well in the case of traffic originating in foreign ports, as in the case of traffic originating within the limits of the United States, *competition that affects rates should be considered*, and in deciding whether rates are charges made at a low rate to secure foreign freights which would otherwise go by other competitive routes, and are not undue and unjust, *the fair interests of the carrier companies*, and the welfare of the community which is to re-

ceive and consume the commodities are to be considered."

And he further remarks:

"It could not be readily supposed that Congress intended, when regulating such commerce, to interfere with and interrupt, much less destroy, sources of trade and commerce already existing, *nor to overlook the property rights of those who had invested money in the railroads of the country.*"

There were dissenting opinions in this case, but not on this point.

In the same opinion some observations of Mr. Justice JACKSON, in the case of the *Baltimore and Ohio Railroad Co.* (43 *Fed. Rep.*, 37), were cited with approbation. He says: "The English cases establish the rule that in passing upon the question of undue or unreasonable preference or disadvantage, it is not only legitimate but proper to take into consideration besides the mere difference in charges, various elements, such as the convenience of the public, *the fair interests of the carrier*, the relative qualities or volume of the traffic involved, *the relative cost of the services and profit to the company*, and the situation and circumstances of the respective customers with reference to each other, as competitive or otherwise."

This decision of Justice JACKSON was affirmed in the United States Supreme Court.

145 *U. S.*, 263.

That the Interstate Commerce Act authorizes such an agreement as this, has also been declared by this Court.

Referring again to the luminous opinion of Mr. Justice JACKSON, already quoted from, and again citing language that was repeated with approval in the opinion of the Supreme Court of the United States in the Texas-Pacific Railway case, he says:

"Subject to the two leading prohibitions that their charges shall not be unjust or unreasonable,

and that they shall not unjustly discriminate so as to give undue preference or advantage or subject to undue prejudice or disadvantage persons or traffic similarly circumstanced, the act to regulate commerce leaves common carriers as they were at the common law, free to make special contracts looking to the increase of their business, to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce, and generally to manage their important interests upon the same principles which are regarded as sound and adopted in other trades and pursuits."

The validity of the agreement here in question must be determined, therefore, not merely upon the language of the Anti-Trust Act taken by itself, but by that language considered in connection with the other statute of the United States which (if this applies) is *in pari materia*, and which deals with the subject so much more exhaustively, and in words so plain that there can be no ambiguity raised in respect of them.

Granting that the Anti-Trust Act in terms makes all contracts unlawful that are in anywise "in restriction of trade," however reasonable and necessary they may be, is that to be understood to invalidate a railway contract made to secure that, and only that, which the Interstate Commerce Act as construed by this Court recognizes as the right of railway companies to receive, and provides means to secure?

It will hardly be claimed that the elaborate provisions of the Interstate Commerce Act on the subject of reasonable rates are repealed by the Anti-Trust Act. If both are to stand, as applicable to this case, they must be read together, the same as if their provisions were contained (so far as they refer to the same subject) in separate sections of the same act.

Suppose that all that is contained in the Interstate Commerce Act in regard to rates of transpor-

tation was thus included in the Anti Trust Act, could it be then maintained that the Agreement here in dispute would be included in the "contracts in restraint of trade" that are declared unlawful? Or would it not be plain that this Agreement was taken by the provisions of those sections out of the scope and meaning of the general words in the first section, even though those words would otherwise have included it?

IV.—Quite aside from the provisions of the Interstate Commerce Act, giving to the companies the right to just and reasonable rates, and to use proper means to maintain them, the same result is reached under the principles of the common law.

1. The term "restraint of trade" employed in the Anti Trust Statute has a common law definition. And as the act furnishes no other, that, upon the general rules of construction, must be taken to be intended. To make the Agreement an infringement of this statute, it must, therefore, be one that would be void at common law.

It is respectfully submitted on this point that in the construction of statutes the rule is absolutely without exception, that where a word or phrase employed has a well settled common law definition distinct from its literal meaning, that is assumed to be the meaning intended, unless a different definition is prescribed in the statute.

Even the Constitution of the United States, a political document of an entirely unique character, has been from the outset subjected by this Court to this rule of construction.

Cooley Cons. Limitations, 75.

2. The definition at common law of a contract "in restraint of trade," is settled by a long course of decision, and is no longer open to discussion.

It is a *contract that restricts trade beyond what is reasonable and just, under the circumstances of the particular case.*

Every case must therefore be judged upon its own circumstances.

Says Mr. Justice JACKSON, in the case, *In re Greene*, 52 *Fed. Rep.*, 109, where the question was whether an agreement restricting competition among distillers associated in what is called the "Whiskey Trust," was void under the Anti-Trust law: "The question of its reasonableness depends on the consideration whether it is more injurious to the public than is required to afford a fair protection to the party in whose favor it is executed. No precise boundary can be laid down as to when and under what circumstances the restraint would be reasonable, and when it would be excessive. In the present case the arrangement treated as a contract was founded upon a valid consideration, and only reserved to the vendors a reasonable protection in their business. It was not an unlawful contract in restraint of trade. The authorities fully support this conclusion."

In *Fowle* v. *Parke*, 131 *U. S.*, 88, the Court through Chief Justice FULLER say, in respect to contracts in restraint of trade: "The question is, whether under the particular circumstances of the case, and the nature of the particular contract involved in it, the contract is or is not reasonable."

In *Oregon Steam Nav. Co.* v. *Winsor*, 20 *Wallace*, 64, Mr. Justice BRADLEY, speaking for the Court, says: "It is a well settled rule of law that an agreement in general restraint of trade is illegal and void, but an agreement which operates merely in partial restraint of trade is good, provided it is not unreasonable."

No review of the very numerous cases in the State courts on this subject is necessary. They are not always reconciliable, for the facts on which they arise differ very widely, and no question has as often been affected in some courts by considerations that

do not belong to the administration of justice. The foregoing citations from the more recent decisions of the highest Federal courts, clearly indicate the result of the best English and American authorities, and are sufficient for the present case. Many others are cited in the opinion of Mr. Justice WHITE in the Trans-Missouri case.

The case of the *Mogul Steamship Co.* vs. *McGregor* (21 *Q. B. Div.*, 553 - 23 *ib.*, 6—*H. of Lords App. Ca.*, 1892, *p.* 1), which dealt with an agreement of this sort among carriers, is an instructive one, and shows the law of England to be the same with that set forth in the cases above quoted. The decision was made by Lord Chief Justice Coleridge in the first instance, affirmed (with one dissentient) by the Court of Appeal, and unanimously by the House of Lords.

And the case of *Nordenfelt* v. *Nordenfelt Gun Co.*, in the House of Lords (App. Cases, 1897), an important and fully discussed case, is a direct authority upon the point that a contract is not "in restraint of trade" unless it is unreasonable, and therefore unlawful.

3. That the Agreement in question here is a just and reasonable one has already been shown.

Nor need it be shown, because the contract which was involved in the Trans-Missouri case was admitted by both the majority and the minority of the Court to be reasonable, though its terms, while substantially similar to those of the Agreement here, were less explicit in making it so.

4. The provision in the Agreement for the discontinuance of unnecessary and expensive agencies, is of no moment. No law requires their maintenance, and therefore it cannot be illegal to cease to maintain them. The real object of reducing their number was, as shown in the answers, to reduce useless expenditures, which are only required to meet ille-

gitimate competition. And to take away the means by which secret and unlawful cutting of rates was made possible.

5. Even if it should be held that the language of the Anti-Trust Act forbids *any* contract in restraint of trade, however just reasonable and necessary, the Agreement here in question would not fall within the prohibition, because it does not tend to restrain trade or commerce, but rather to promote them.

A restraint upon excessive and unwholesome competition is not a restraint upon trade, but is necessary to its maintenance.

This view is so fully presented and discussed in the brief of Messrs. Carter and Ledyard, that further argument in support of it is not requisite.

V.—There is no ground whatever for asserting that the Agreement infringes the provision of the Anti-Trust Act against monopolies.

The definition of the word "monopoly," both in its legal and its ordinary signification, is the concentration of a business or employment in the hands of one, or at most, of a few. That is the plain meaning of it as employed in the Act. No feature of the Agreement, in any view that can be taken of it, approaches this definition.

So far from tending toward the concentration of railroad transportation in fewer hands, it does not in any possible event withdraw it from a single road now in existence, nor throw the least obstacle in the way of the construction of others.

Its effect will be, if it is successful, not to diminish, but to increase transportation facilities, by preserving roads that might otherwise be driven from the field.

The contention of the Government that any agreement that tends towards the restriction of unlimited competition is a monopoly, does violence to language, and only renews under another name the discussion already dealt with. If the Agreement is not unlawful upon the grounds previously considered, which include all the objections that can be stated to it, it will not become so by the misapplication to it of the term "monopoly," which for this purpose is a mere epithet.

On the contrary, the surest and most effectual way in which monopolies in railroad business can be fostered, is to prohibit those just and necessary arrangements between railroad companies by which alone the majority of them are enabled to survive.

The unavoidable result of unlimited competition in a business from which those engaged in it cannot withdraw without ruin, and must, therefore, continue to the very last, must be the gradual absorption of the weaker roads by the stronger, who will ultimately be placed beyond the reach of even just and fair competition, by the want of competitors.

And the Act of Congress, designed for no purpose whatever but to prevent monopolies, becomes, by such an application of it, an Act to create them in the only branch of business over which Congress has any authority.

Ninth Point.—If the construction of the Anti-Trust Act which was adopted by the Court in the Trans Missouri case is to stand, it is respectfully insisted that the Act, so far as thus interpreted, and applied, is in violation of the provisions of the Constitution of the United States, since it deprives the defendants in error of their liberty and their property without due process of law, and deprives them likewise of the equal protection of the laws.

This point was not made on the argument of the Trans-Missouri case, because no such construction of the act was anticipated by counsel. Nor was it considered by the Court, since it is an unvarying rule that no objection to the constitutionality of a law will be considered, unless raised by the party affected.

The question thus presented is not whether the act in general, or in its application to the many other cases to which it is obviously addressed, is unconstitutional, but whether *the Agreement here under consideration* is one that may be prohibited by legislation, without infringing the freedom of contract and the right of property, which the Constitution declares and protects.

That a vast number of other contracts equally just and reasonable are equally affected, need not be pointed out. That there comes within the scope of the statute also, a large class of contracts which all law condemns, is just as apparent. This only illustrates the importance of a just discrimination, if not in the construction of the statute itself, in the application of the constitutional protection against oppressive legislation, to which private rights, when invaded, are entitled. It is the personal right that is infringed that invokes the protection, not the terms, the general object, or the effect in other cases of the statute in question.

I.—As thus construed and applied, the language of the Act becomes precisely this, so far as the present case is concerned; that any agreement between competing railway companies entered into for the purpose of maintaining rates of transportation, shall be unlawful, punishable criminally, and restrainable by injunction at the suit of the United States Government, notwithstanding it is made to appear that such agreement only maintains and is only intended

to maintain the just and reasonable rates which said companies are legally authorized to demand, and has not had any other or different effect. And, notwithstanding that it is further made to appear that such agreement is necessary to enable said companies to maintain such rates, and properly to transact the business authorized and imposed upon them by their charters.

The record before the Court conclusively establishes the fact that the Agreement here in question was so designed and intended, has not had and is not intended to have any other result, and is necessary, as determined by long practical experience, to the maintenance of just and reasonable rates, and to the proper discharge of the business of the companies.

The averments of these facts in the answers are full, explicit, and upon personal knowledge. They are consistent with and are sustained by the provisions and language of the Agreement. They are in the strictest sense responsive to the bill. And all the circumstances of the case which bear upon them are carefully and fully set forth and explained.

The truth of these averments is conceded by the complainants, by setting down the case for trial upon bill and answers. By these pleadings they are therefore concluded, so far as the facts of the case are concerned, and no room is left for inference, assumption, or conjecture inconsistent with the record. The case that is to be tried is the case that the record presents.

And in the Trans-Missouri case, where the contract under consideration was similar to the one here in controversy, though far more open to the objections here urged, it was conceded, both in the majority and the minority opinions of the Court, that its substantive character and purpose were such as the answers in the case aver and set forth.

It was for this reason believed by the minority of

the judges that it could not have been the intention of Congress that such a contract should be made a penal offense. But it was held by the majority that the language of the act admitted of no other construction. Though it was conceded in the opinion of the Court that the arguments against that conclusion "*bear with much force upon the policy of an act which should prevent a general agreement of rates among competing railroad companies, to the extent simply of maintaining those rates which were reasonably and fair.*"

And in the opinion of the minority of the Court by Mr. Justice WHITE, he remarks, after stating the general features of the contract, "*I content myself with giving this mere outline of the contract, and do not stop to demonstrate that its provisions are reasonable, since the opinion of the Court rests upon that hypothesis.*"

The accuracy of the statement we have made above, of the legal effect upon this case of the Anti-Trust Act, as so construed, is thus both established and conceded.

And the question distinctly arises, whether legislation having such a result is within the power of Congress.

II.—That the operation of the Act as thus interpreted does in fact, by prohibiting the contract here in question, deprive the defendants, (whether rightfully or not), of both liberty and property to a very grave and perhaps ruinous extent, is not open to question.

A just freedom of contract in lawful business is one of the most important rights reserved to the citizen under the general term of "liberty," for all human industry depends upon such freedom for its fair reward.

The use of property is an essential part of it, and when abridged the property itself is taken. Its use is abridged when the owner is precluded from any contract that is necessary or desirable in order to secure to him a just compensation for its employment.

And when any class in the community is so precluded, it is to that extent "deprived of the equal protection of the laws."

These are elementary propositions in constitutional law, and have been often asserted by this Court.

Pumpelly v. *Green Bay Co.*, 13 *Wall.*, 166.

Stone v. *F. L. & T. Co.*, 116 *U. S.*, 307.

C., M. & P. R. Co. v. *Minnesota*, 134 *U. S.*, 459.

Reagan v. *Far's L. & T. Co.*, 144 *U.S.*, 397.

III.—The only authority of Congress over the agreement in controversy is such as may be deduced from their power "*to regulate commerce.*" And is limited by the reasonable necessities of such regulation.

As contracts of this sort are not in themselves wrongful, have never before been held or deemed unlawful, and have been customary in all kinds of business in which they have been found useful, the right to prohibit them, if it exists at all, must arise under what is called the police power.

But the general power of police regulation is not vested in Congress. It is reserved to the States. In *U. S.* v. *Knight Co.*, 156 *U. S.*, 11, it is said by the Court: "It cannot be denied that the power of a State to protect the lives, health and property of its citizens is a power originally and always belonging to the States, not surrendered to the general government."

And it was upon that ground held in that case, that a combination in restraint of trade or to create a monopoly could not be punished or restrained under the Anti-Trust Act, unless it amounted to an interference with interstate commerce.

The railroad companies, which are parties here, were chartered by their respective States, and are subject to their charters and to the laws of their States in respect to rates and all matters thereto pertaining. The only authority in Congress over them is therefore that which is necessary to the regulation of interstate commerce, and which may be regarded as a special power of police regulation, so far as is requisite to the discharge of that duty.

IV.—No exercise of the police power, whether the authority on which it rests is general or special, can be allowed to infringe rights secured by the Constitution of the United States.

No public good can be attained and no public necessity relieved by unconstitutional means.

In the case of *N. O. Gas Co.* v. *Louisiana Light Co.*, 115 *U. S.*, 661, the Court said:

"Definitions of the police power must, however, be taken subject to the condition that the State cannot in its exercise for any purpose whatever encroach upon the powers of the general government, *or rights granted or secured by the supreme law of the land.*"

And in *Walling* v. *Michigan*, 116 *U. S.*, 446, per BRADLEY, *J.*:

"The police power cannot be set up to control the inhibitions of the Federal Constitution."

And in *Kugler* v. *Kansas*, 123 *U. S.*, 661, per HARLAN, *J.*:

"Undoubtedly the State, when providing by legislation for the protection of the public health, the public morals or the public safety, is subject to the paramount authority of the Constitution of the

United States, and may not violate rights secured by that instrument." * * * "If, therefore, a statute purporting to have been enacted to protect the public health, the public morals or the public safety, has no real or substantial relation to those objects, or *is a palpable invasion of rights secured by the fundamental law*, it is the duty of the Courts to so adjudge, and thereby give effect to the Constitution."

To the same effect are many other decisions of this Court.

V.—Approaching then the consideration of the constitutional right of the defendants in error to enter into this Agreement, it is first to be observed that their right under their charters, and by the law of the land, to demand and receive just and reasonable rates of transportation, and to refuse to carry passengers or freight for less, is not open to dispute.

There is no case known to English or American law, in which any man can maintain a claim that the use of property should be furnished or services performed for him at less than a reasonable compensation, unless under a specific contract for a less sum. Even such a contract, if grossly unreasonable, will often on that account alone, and always if any other element of injustice or unfairness is connected with it, attract the interposition of a court of equity.

Railway companies, though creations of the legislatures, from which they derive their powers and to whose enactments they are subject, are no exception to this rule. Though the legislatures may regulate and to a reasonable extent prescribe their rates, it has been repeatedly held by this Court, and is now fully settled, that they cannot be reduced below a just and reasonable amount, fixed in view of all the circumstances of the case.

In *Reagan* v. *Farmers' Loan & Trust Co.*, 154 *U. S.*, 362, this subject was exhaustively considered upon full review of all the previous decisions in relation to it, and in the opinion of the Court by Mr. Justice BREWER it was held that a railroad company cannot be deprived by legislation of the right to just and reasonable rates, or compelled to accept less. And that the question of unreasonableness is for judicial consideration.

The same decision was made in *Stone* v. *Fars.' Loan & Trust Co.*, 134 *U. S.*, 418, and in *Ch., &c., R. Co* v. *Minnesota*, 136 *U. S.*, 459. In the latter case it was held that a court appointing a commission to fix railway charges, and making the rate so fixed conclusive, was unconstitutional, and that the company was entitled to just and reasonable rates, to be judicially determined in case of dispute.

If, therefore, each and all of these defendants, jointly or severally, should refuse to furnish transportation as common carriers unless for a reasonable compensation, *even though required to do so by statutes of their States*, they would be strictly in the exercise of their legal right, not only against the consignors, but against the Government itself.

And therefore the ground upon which the Agreement in the present case is claimed to be a violation of law, is not that the thing agreed to be done is unlawful, but that it *is unlawful for the parties to agree to do what is lawful, and what each of them has the right to do without any agreement; and what it has become necessary for them to agree to do beforehand, in order to render it possible for them to do at all; and what it is necessary to do, in order to the successful transaction of their lawful business.*

VI.—The true test of the constitutionality of a law which abridges the freedom of contract, must

necessarily be found in the reasonableness and justice of the contract abridged.

The power of the Legislature to prevent unjust and mischievous contracts where the public welfare requires it, must be admitted. The constitutional prohibition against the deprivation of liberty and property does not forbid such a law, because the freedom to make contracts of that character is not a part of the liberty of the citizen, nor is it a right of property.

But when, as in this case, the contract which a statute undertakes to forbid is not unjust or unreasonable, and is one that the general principles of law and morality sanction, and much more when it is seen to be necessary to the lawful enjoyment of lawful property, then the constitutional prohibition, designated as a protection against precisely such legislation, is directly encountered.

And if an interference of that sort may be justified upon the ground that the Legislature deems it proper, the constitutional provision is nullified. It comes only to mean that men shall not be deprived of liberty or property unless the Legislature chooses to do so, and that statutes having that effect shall not be passed unless the Legislature thinks proper to pass them.

This, then, must be the criterion: *Is the contract sought to be prohibited one that by the general principles of law and justice it is the right of the party to make;* or is it unjust, unreasonable, and mischievous, and *therefore* unlawful? To say that it can be forbidden, because made unlawful by the statute that forbids it, is simply to abolish the constitutional inhibition, and to give to Legislatures unlimited power.

The Legislature cannot create restrictions upon freedom of contract that the established rules of law and the dictates of justice do not justify, nor set up rights in any class of the community as against another class, which are not founded in law

or justice, and which result in taking one man's property for the unjust benefit of another.

That a line must be drawn somewhere that limits the power of the Legislature under the Constitution to abridge the freedom of contracts, is plain. Upon what other principle, or by what other rule is it possible to draw it? They cannot prohibit *all* contracts they may desire or attempt to prohibit. What contracts then may they not prohibit, if they may prohibit just, reasonable and lawful contracts at all?

In *Gibbs* v. *Balt. Gas Co.*, 130 *U. S.*, 409, Chief Justice FULLER says: "Innumerable cases might be cited to sustain the proposition that combinations among those engaged in business impressed with a public or quasi public character, which are manifestly prejudicial to the public interests, cannot be upheld." And cites with approval from *Bishop on Contracts, Section* 549, which enumerates the varieties of unlawful contracts, including "all detrimental to the public order and public good, *in such manner and degree as the decisions of the Courts have defined.*"

In *Austin* v. *Murray*, 16 *Pick.*, 121, it is held that the test of the validity of a public regulation where the subject dealt with is proper for the exercise of that power, is whether the regulation is *reasonable.*

In *Waters* v. *Wolf*, 162 *Penn. St. Rep.*, 153, it is held that the right to make any contract that is reasonable, and that imposes no unreasonable burdens upon others, is an indefeasible right which the Legislature cannot take away.

State v. *Goodwill*, 33 *West Va.*, 179, is to the same effect.

And also *Com.* v. *Perry*, 155 *Mass.*, 117.

VII.—The question has thus far been considered upon general principles. But there are many cases, in many courts, where statutes designed for the protection of the public against some real or supposed mischief have been held to be unconstitutional, on the ground that they invaded personal liberty and the right of property, by infringing the right to freedom of contract.

In *Allgeyer* v. *Louisiana*, 165 *U. S.*, 578, it was held by this Court that a statute prohibiting citizens of Louisiana from making contracts of insurance in companies outside the State which had not complied with the insurance laws of the State, was void, as depriving the citizen of his liberty without due process of law.

In *Shaver* v. *Penna. Co.*, 71 *Fed. Rep.*, 931, it was held by the United States Circuit Court in Ohio, that a statute of that State prohibiting railroad companies from entering into contracts with their workmen in respects to liability for personal injuries, was unconstitutional for the same reason.

The same statute was declared unconstitutional by the Supreme Court of Ohio, in the case of *Cox* v. *The Railway Co.*, 43 *N. E. Rep.*, 313.

In the Court of Appeals of the State of New York, several important cases involving the right to freedom of contract have been decided, and the subject has been discussed both in the argument and the opinions, with an ability and breadth of view that have commanded wide attention and approval.

In the case, *In re Jacobs*, 99 *N. Y.*, 98, an act prohibiting the manufacture of cigars in tenement houses was held void, as an unauthorized interference with the liberty of the citizen.

In *People* v. *Marx*, 99 *N. Y.*, 377, a statute prohibiting the sale of oleomargarine was adjudged void upon the same ground.

In *People* v. *Gibson*, 109 *N. Y.*, 389, an act which made unlawful what are known as "gift sales," that is, sales where a gift is made to the purchasers

if a certain amount is bought, was decided to be unconstitutional.

In the case of *Com.* v. *Perry*, 155 *Mass.*, 117, an act prohibiting manufacturers from imposing fines upon workmen, and withholding wages for defects in work, was held void.

In *Godchalk* v. *Wigeman*, 113 *Penn. St.*, 431, it was held that a statute which prohibited manufacturers from paying workmen in orders on a store, was void as abridging freedom of contract.

Similar statutes were held unconstitutional for the same reason in *State* v. *Goodwill*, 33 *W. Va.*, 179; in *Frorer* v. *People*, 141 *Ill.*, 171 (overruling *Hancock* v. *Yoden*, 121 *Ill.*), and in *State* v. *Loomis*, 115 *Mo.*, 307.

In *Waters* v. *Wolf*, 162 *Penn. St.*, 153 (before cited), a statute enacting that although a contract between an owner and a contractor for erecting a building provides that no mechanics' liens shall be filed, a sub-contractor shall nevertheless have a lien on the building for his work and materials, was declared unconstitutional.

In *Spry Lumber Co.* v. *Trust Co.*, 77 *Mich.*, 199, an act was held unconstitutional which gave the creditors of a contractor for the erection of a building, a lien on the building for materials furnished the contractor.

In *Kuhn* v. *Detroit*, 70 *Mich.*, 534, a law prohibiting a liquor dealer from becoming surety on a liquor dealer's bond, was held void as in violation of the 14th Amendment in the Constitution of the United States, as well as of a provision in the same words in the Constitution of Michigan.

In *Millett* v. *People*, 117 *Ill.*, 294, an act that provided that all contracts for mining coal should be void unless the compensation therefor was by weight, ascertained in the manner required by the act, was held to be an unconstitutional interference with the freedom of contract.

Similar statutes in respect to coal mining were held unconstitutional for the same reason, in *Ram-*

sey v. *People*, 142 *Ill.*, 380; in *Harding* v. *People*, 160 *Ib.*, 459; in *In re House Bill*, 21 Cal., 27.

In *State* v. *Julow*, 129 *Mo.*, 163, an act was held to be unconstitutional which prohibited employers from contracting with employees that they should not join or remain in a trades union.

In *Low* v. *Rees Printing Co.*, 41 *Neb.*, 127, a statute was declared void as abridging the right of free contract, which provided that a day's work should not exceed eight hours, and that for labor beyond that the employer should pay a compensation which increased in geometrical progression.

In *Ex parte Kuback*, 85 *Cal.*, 274, an ordinance was held unconstitutional which made it a misdemeanor to employ in work for the city any person to work more than eight hours in a day, or to employ Chinese laborers.

In the case, *In re Eight Hour Law*, 21 *Cal.*, 30, a statute prohibiting employees from contracting for more than eight hours work in a day, was declared by the Supreme Court of that State to be unconstitutional as in violation of the right of contract.

In *Loop* v. *St. L. R. Co.*, 58 *Ark.*, 407, it was held that the Legislature cannot make it unlawful for individuals to agree with each other that wages shall be paid at any time after they are earned. And that an act requiring those constructing railroads to pay employees on the day they were discharged, and giving a penalty for delay, was unconstitutional in the case of individual employees, but valid as against railroad companies chartered in that State, because taken to be an amendment of their charter.

In *Atchison R. Co.* v. *Baty*, 6 *Neb.*, 37, a statute was held void which allowed the owners of property destroyed by a railroad company to recover double its value.

And in *Yick Wo* v. *Hopkins*, 118 *U. S.*, 356, an ordinance was held unconstitutional which forbid laundry business within the corporate limits, except by consent of the supervisors, unless it was located in a brick or stone building.

These cases fully support the proposition that just reasonable and lawful contracts in relation to property or business cannot be made unlawful by legislative enactments.

Many of the decisions are by the courts of some of the newer States, where the Judges are elected by the people at short intervals, and where a mistaken public sentiment has demanded, and Legislatures which were its echo have therefore adopted, the various enactments that are held to be unconstitutional.

These circumstances do not lessen the authority of the decisions, and they reflect great honour upon the courts in which they were made.

VIII.—The police power when invoked to prohibit any act that is otherwise lawful, while it may fall short of the demands of public necessity by reason of constitutional limitations upon its exercise, can never exceed that necessity.

The right on the part of the public to the protection sought to be afforded, and the necessity for it, are not only the sole reason and foundation of the power, but designate the boundary at which in all cases it must terminate.

The existence of such a necessity when denied, is therefore a question for judicial determination. And the enquiry in the present case is whether it is to be found in the requirements of interstate commerce, since that is the limit of congressional authority in the premises.

As remarked by this Court through MILLER, *J.*, in *Chi Yung* v. *Freeman*, 92 U. S., 280, in reference to the right of a State to protect itself by the power of police regulation against paupers and criminals from abroad: "Such a right can only result from a vital necessity for its exercise, and cannot be carried beyond the scope of that necessity."

Says *Judge* CHRISTIANCY in *People* v. *Jackson and U. P. R. Co.*, 9 *Mich.*, 285:

"Powers which can only be justified on that specific ground (that they are police regulations), and which otherwise would be clearly prohibited by the Constitution, can be such only as are so clearly necessary to the safety, comfort and well-being of society, and so imperatively required by the public necessity, as to lead to the rational and satisfactory conclusion that the framers of the Constitution could not, as men of ordinary prudence and foresight, have intended to prohibit their exercise in the particular case, notwithstanding the language of the prohibition would otherwise include it."

Tiedman in his treatise on Police Powers (*p.* 4), quoting this as a correct statement of the law, adds: "And in all such cases it is the duty of the courts to determine whether the regulation is a reasonable exercise of a power which is generally prohibited by the Constitution."

He remarks, further: "According to the maxim, *sic utere*, &c., it being of universal application, it must, of course, be within the range of legislative action to define the mode and manner in which every one may so use his own as not to injure others. Any law which goes beyond that principle, which undertakes to abolish rights the exercise of which does not involve an infringement of the rights of others, or to limit the exercise of rights beyond what is necessary to provide for the public welfare and the general security, cannot be included in the police power of the government. It is a governmental usurpation, and violates the principles of abstract justice as they have been developed under our republican institutions."

And, as declared by this Court in the case of *Kugler* v. *Kansas*, *supra*, "The Courts are not bound by mere form, nor are they to be misled by mere pretences. They are at liberty, and indeed are under a solemn duty, to look at the substance of

things whenever they enter upon the inquiry whether a Legislature has transcended the limits of its authority."

IX.—In determining whether any proposed legislation which affects the liberty or the property of the citizen is justifiable on the score of public necessity, two principal points are to be regarded; the right of the public to the benefit thereby derived, and the reasonable necessity of the means invoked to secure it.

It is not to be maintained that either liberty or property can be invaded in order to obtain for the public an advantage it is not entitled to.

Nor can that be set up as the right of the public which is only a benefit sought to be obtained by one class in the community at the expense and unjust loss of another, which is equally entitled to protection.

Nor can means prejudicial to private interests be sanctioned, when not necessary to secure to the public a benefit to which it is really entitled.

In all these respects, the legislation in question is destitute of the foundations essential to its validity.

1. The public is not entitled to the alleged benefit which is claimed to be the result of the prohibition of this Agreement.

The only ground on which such a prohibition has been attempted to be justified in argument, is, that "the public" is entitled to have maintained by law, by a prohibition of the only agreements that could prevent it, a competition which, however destructive to the carriers, is likely to result in affording to shippers of freight, rates of transportation that are less than reasonable and just.

It has already been shown that the competition

restricted by this Agreement is only that which reduces rates *below* that point.

That the shippers of freight are not entitled to have it carried for less than a just compensation, is a necessary corollary of the proposition that the carriers are entitled to receive a just compensation for carrying it. It is plain, therefore, upon the facts which the record presents, that the competition which is here claimed to be a right of the public, is one that couldonly result in giving to one class of the community what they are not entitled to, out of the pockets of another.

The claim is, in other words, that one class of the community is entitled to be protected in the opportunity to rob another. For he robs his neighbour who extorts from his embarrassment or distress, labour or property for less than a just price.

Suppose that instead of an agreement tending to the maintenance of just rates, one should be made, binding the parties under whatever stress of competition, not to transport passengers or freight for nothing. It is well known that competition between rival lines has sometimes become so bitter as to reach that result. Such a contract upon this theory would be equally criminal, as against public policy, because under it "the public" might lose the chance of being transported free at the carriers' expense. It has as much right to be carried free, as to be carried for a rate less than reasonable, and therefore in the end ruinous to the carrier.

Or suppose that the contract between these railroad companies had been, in so many words, that each bound itself to the other not to carry freight for less than the reasonable price they were legally entitled to receive. In other words, had expressed in terms what it now expresses in effect and intent. Could it be maintained that the public has a right

to prevent by legislation such a contract from being carried out?

2. The alleged public interest which is sought to be made the basis of this extravagant measure, is not the interest of the public, but of one class, which can only be secured at the expense and unjust loss of another.

Railway stocks and securities are much the largest personal investments in the country, in which many millions of investors, chiefly those of moderate property, are interested.

The total amount of reported railroad capital in 1894 was nearly eleven thousand millions.

The New York Central Railroad Company alone had on the first of April, 1897, 13,115 registered stockholders, and many times that number of bondholders. The savings institutions, and the trusts, public and private, for the support of charitable, educational and religious institutions, whose funds are embarked in the same securities, are innumerable. The money which these securities represent has created the railroads. To destroy or seriously to impair the income derived from them, would be a robbery which would inflict widespread and incalculable distress. The socialist idea, fostered among the ignorant by demagogues, that because the aggregate capital of a railroad company is necessarily large, its destruction would only affect the rich, and would in some unexplained way benefit the poor, is seen to be an imposture and a delusion as soon as it is perceived whence that capital is derived, to whom it belongs, and how far it enters into the industrial system of the country, upon which all business and all property depends. No one imagines that railways can be dispensed with, but it is supposed by those who know no better, that they may and ought to be compelled to do the business of "the public" at a loss.

Every railroad failure reaches likewise a multitude of unsecured creditors, throws many people out of employment, depreciates securities generally, and affects business unfavorably, sometimes disastrously.

The number of railroad employees in the United States in 1893 was about 874,000 men. Owing to severe depression in the railroad business, this number in 1894 had fallen to about 780,000. Not only was an army of 100,000 men forced out of employment, but there was a general cut of wages in all grades of the service. Five thousand general officers suffered, as well as 180,000 trackmen and 150,000 shopmen and about 500,000 other employees. Wages were lowered directly, and time was reduced by the same result indirectly. Industries depending on the railroads as buyers experienced a lack of demand, and in turn were forced to curtail the working forces or reduce wages, and many millions of people, besides those actually discharged and their dependents, found themselves less able to buy the necessaries of life.

Interstate Com. Commission, 7th Annual Rep., p. 32.

By an undue depreciation of earnings, which necessarily induces a low condition of roads and equipment, the general safety of the public, as well as adequate facilities in the transaction of business are imperiled.

These great lines are now so interwoven in many ways with the industries, the business and the financial affairs of the country, that their reasonable prosperity is vital to the general public interest.

Not more directly or deeply is the community at large interested in the solvency of the institutions which are allowed to issue the currency of the country--a solvency which it is conceded to be one of the highest duties of government to protect.

There is no greater curse to a business community than an insolvent railroad, struggling by all expedients to maintain an existence that its income cannot support, cramped in its facilities, unable to meet its engagements, fluctuating in its rates.

It can be no sound public policy that tends to drive agencies indispensable to all industry into such a condition.

It is very obvious, therefore, upon the least consideration of the subject, that the class who might be expected to profit out of a competition among railways that would reduce rates below what is just, is much more limited in number and importance than that at whose expense such an unrighteous profit must be extorted.

The language of this Court in *Reagen* v. *Far. Loan & T. Co.*, before cited, is pertinent upon this state of facts: "Is it just to deprive one party of all compensation in order that another may make more profit? They who invest their money in railroads take the same chances that other men do of making profit from the carrying on of their business, and as appears from other cases submitted to us with this, some of the railroads in the State of Texas have been operated at a constant loss. But such possibilities of loss are simply the natural result of all business freely carried on, against which the law is powerless to afford protection. Very different are the considerations which arise when the strong arm of the law is invoked to compel parties engaged in legitimate business, and business that cannot be abandoned at will, so to reduce their charges for revenue as to make the carrying on of that business result in a continual loss. In the one case the law is powerless to prevent injury; in the other it is used to effect injury. * * * The equal protection of the laws—the spirit of common justice—forbids that one class should be compelled to suffer loss that others may make gain."

3. Nor, if the shippers of freight by railroads were entitled to be regarded as constituting "the public," to whose interests the rights of all others must give way, can there be shown the slightest necessity for any such extreme and unprecedented means of protection against the danger of railway charges that are unreasonably high. There is no more occasion for it, even in their interest, than there is justification for it. For there is no mischief that can conceivably arise out of any form of restraint of trade, that is already so completely guarded against by effectual legal provisions as that is.

Quite independently of the ordinary legal protection which the common law affords against any unreasonable demand, railway companies are in the first place subject to the restrictions in their charters in the matter of rates, and to the provisions of the respective State laws relating to it. That these are severe enough is well known, and is shown by the various cases where only the interposition of the Federal Courts has prevented them from proving oppressive.

They are, in the next place, subject to the provisions of the Interstate Commerce Act, which render rates in that business which are in the least excessive, absolutely impossible.

If every railroad in the country was free from any competition whatever, it would still be out of their power to exact unreasonable rates in interstate commerce, in the face of the requirements of this law.

The fullness, efficiency and stringency of its provisions, to reach, prevent and redress any and every such attempt, can only be seen by a careful perusal of the whole Act.

All railroad rates and charges in interstate business, as has before been pointed out, are required by that Act, to be just and reasonable, and must be conspicuously posted for the information of the public, and filed with the Commissioners. They cannot be advanced but upon ten days' notice to the Commissioners and similar publication. If any such rates

so posted are unreasonable, it is the duty of the Commissioners to correct them upon their own motion, or that of any party aggrieved, or of any State Commissioners. If any unreasonable or unjust charges or improper discriminations are made against any person, he has a prompt and summary remedy, either by application to the Commissioners or by suit at law, at his option, for the damages he has sustained. And summary and severe punishment of the guilty party by fine and imprisonment is also provided for by the Act.

Congress had, therefore, before the passage of the Anti-Trust Act, fully exercised its power of police regulation of rates and charges of transportation in interstate commerce, by this carefully devised system of legislation.

By various successive amendments, by much experience of administration, and by many decisions of this Court and of the intermediate Federal courts, that system has been improved, enlarged and applied.

That the rates exacted or even demanded by carriers in interstate commerce shall be no more than reasonable and just, has thus been made certain, if anything can be made certain by legislative, judicial and executive authority. Certainly the usefulness of the power of police regulation on the subject has been exhausted, if its outside limits have not been reached.

It is upon this state of legislation, and after Congress has thus completely met and provided as far as human law can do, against the only mischief that the prohibition of all restraint upon competition can be supposed to remedy, that it is claimed that the necessity still exists for taking away from railway companies all freedom of contract, however reasonable and just, even such as is necessary to secure to the carriers the same right to reasonable charges which they are required to concede so scrupulously to the carried.

Surely an extraordinary illustration of that *public necessity* to which constitutional limitations must give way.

4. If there were no legislation whatever in restraint of rates of transportation, it still would be impossible, under the conditions that prevail, that unreasonable rates could be exacted by railroad companies. For they have been for a long time past entirely unable, in consequence of the number of roads and the excessive competition, to maintain rates that are fairly remunerative.

Statistics in the report of the Interstate Commerce Commission for December 1, 1895, show that rates of freight transportation had declined between 1865 and 1893 from 3.08 cents per ton per mile to 0.76 cents.

The total amount of reported railroad capital on June 30, 1894, was $10,796,473,813, or $62,951 per mile of line. Of this $4,834,075,659 was capital stock, while the funded debt represented by bonds and other securities was $5,356,583,019. The amount of stock paying no dividends was $3,066,150,094, or 63.43 per cent. of the total amount. The amount of bonds paying no interest was $650,573,789, or 14.17 per cent. The amount of miscellaneous obligations paying no interest was $53,426,264 or 11.71 per cent., and the amount of income bonds paying no interest was $210,757,554, or 86.94 per cent.

During the three years ending December 31, 1894, receivers were appointed for railroads having a total length of 46,875 miles, capitalized at $2,534,529,000, and 9,078 miles, capitalized at $494,821,000, were sold under foreclosure, destroying or readjusting these investments. From January 1st to July 1, 1895, these totals were increased 2,409 miles, capitalized at $149,615,000, and 2,396 miles, capitalized at $100,941,000, which respectively went into the hands of receivers, and were sold under foreclosure.

The year ending June 30, 1894, showed that the

income of railroads in a section including 52 per cent. of the railroads of the country did not produce enough above the actual cost of operation to pay their fixed charges during that year.

In the face of these figures can it be maintained that transportation rates are too high, or are in danger of becoming so? Or that an agreement designed to restrict the excessive and ruinous competition to which those results are wholly due, needs to be made a criminal conspiracy.

5. Nor is it true that even the shippers themselves are interested, in the long run, in obtaining the carriage of their goods at rates unreasonably low. They are at the same time members of the general public, and are affected, with the rest of the community, by the common embarrassment and distress. The temporary direct gain in rates unduly low is much more than offset by the ultimate indirect loss. Business, to continue profitable, must be reasonably advantageous to both sides.

And to the shippers as such, the results of an undue competition are much more injurious than profitable, in the unstable, fluctuating and uncertain rates which it never fails to produce.

This is lucidly and admirably set forth by Judge Cooley, the first chairman of the Interstate Commerce Commission, in an address before the National Convention of Railway Commissioners in 1891. And likewise in an article by Judge Schoonmaker, also a member of the Interstate Commerce Commission, published in the *Railway Review* of August 15, 1891. The official experience of these gentlemen, as well as their eminent ability and distinction, give great weight to their opinion.

The proposition that to all shippers of freight who are engaged in trade or in manufactures uniformity and stability of rates are more important than their fluctuating reduction to an occasional point un-

reasonably low, is so well established as to have become an axiom.

A dealer who has acquired or purchased a stock of goods, the cost of which depends in part upon railway rates, may be compelled at any moment to dispose of them at a loss, by an unjust reduction of those rates to a competitor, who is thereby enabled to undersell him in the market.

This is one of the mischiefs against which the Interstate Commerce Act is directed.

6. Even were further protection against unreasonable rates necessary, it cannot be maintained that the prohibition of *all* restriction upon competition, however necessary and reasonable the restriction may be, is requisite to secure it.

That involves the proposition that the freedom of just, innocent and indispensable contract in relation to property and industry can be taken away, as a means of guarding against the dangers of unjust and mischievous contracts. Those can be dealt with when they arise, and prohibited before they arise. To destroy all right of contract is not a means either necessary or justly adapted to the end of protecting the public against bad ones.

It is right to prohibit usurious contracts. But could all negotiable notes be forbidden? Although it is well known that the most facile method of usurious contract is to include the usury in the principal of such a note, and transfer it to an innocent holder.

It is right to prohibit contracts upon immoral considerations. But may all contracts by men with women be inhibited, in order to make sure that no improper agreement takes place?

The safety of foot passengers is necessary to be provided for by proper regulations. But may all vehicles be for that purpose excluded from the streets? Though, doubtless, by so doing, the lives of countless foot passengers would be saved.

These illustrations might be indefinitely extended. They would be found in every form that police regulation ever assumed. If carried far enough, that power would put an end to all business and industry, in order to prevent the evils, the accidents and the crimes that always accompany it, under whatever circumstances. The illustrations only show that the power to regulate is not the power to destroy. And that the test of every regulation must be found in its just necessity in view *of all interests concerned*, and not in its possible usefulness, looking at its purpose alone, or regarding the rights of one class of people only.

Through all the history of the common law the discrimination has been maintained between restraints of trade that were unlawful because unjust and unreasonable, and those that were lawful, because just and reasonable. There has never been the least difficulty in making and enforcing this discrimination. Never before has it been proposed in a court of justice that all contracts that tend to restrain trade in any degree may be prohibited, in order to exclude those that might restrain it unduly.

X.—It is no answer to say, as has been said, that such an Agreement as is here in question would be unnecessary if each and every company would insist for itself upon just rates, as it has a right to do. That suggestion only emphasizes the character of a statute which makes it criminal for parties to agree to do what they are to blame for not doing without an agreement, since it is necessary to their own protection.

The question is not whether the Agreement is necessary to the companies, but whether the right to make it, if they think proper, can be taken away. Freedom of contract is not limited to contracts which are necessary. It extends to all contracts, however superfluous, which are not void as against

public policy. If this one is of that character it must fail, but if not, it cannot be made unlawful because it is unnecessary. Few special contracts would be necessary if all parties concerned in the transactions to which they refer would always do right.

XI.—But such agreements between competing railway companies are in fact necessary, as has been demonstrated by long and disastrous experience.

Property once invested in a railroad cannot be withdrawn, nor can it cease to be operated without perishing. The concern must go on, and if it cannot earn what it needs, must earn what it can, until it can earn no longer. When, as is usually the case, there is not enough business for all, the competition is for existence. To expect that under such circumstances all will adhere to just rates, unless bound by some common agreement, is as idle as to suppose that in a shipwreck or a fire in a crowded building no one will attempt to save his life at the expense of due consideration for others. And whether even any common agreement can be made effectual, is the experiment which yet remains to be tried.

That all the mischiefs in the business of railway transportation that have been referred to, are the necessary results of unrestricted competition, is not only averred in the answers by statements the truth of which is conceded, but is a matter of general public knowledge, and has been clearly set forth by former members of the Commission.

They have shown from year to year in their annual reports, the great and growing evil of unrestrained and excessive competition; the difficulty of restricting it; its ruinous consequences to the railroads; its pernicious effect upon the public interest. They have habitually encouraged traffic associations like that in the present case, and declared them to be lawful, desirable and necessary.

In the request for the prosecution of this case, so far as it is to be taken to be concurred in by its members, the Commission contradict what has been their uniform position on this subject from the outset, and all that they have ever before given utterance to officially, in respect to it.

1 *Interstate Com. Rep.*, 288-653-671; 2 *Ib.*, 148-241-256; 3 *Ib.*, 23-25-41; 4 *Ib.*, 4-19-21-33; 5 *Ib.*, 263.

Judge Cooley, Railw. Rev., Ap. 26, 1884.

XII.—In recapitulation of the points above presented upon the question of the constitutionality of the Anti-Trust Act, if it is held applicable to the Agreement in this case, we respectfully insist:

1. That the act deprives the defendants of both liberty and property, by forbidding a contract just and reasonable in itself, essential to the use of their property and the prosecution of their business, and never before held or claimed to be unlawful or wrong, and by which they only agree to do what they have a right to do.

That no such contract can be prohibited by law without a violation of the constitutional provision, whatever advantage to the public in keeping down rates of transportation may be expected to result from it.

And that in attempting such a prohibition, the case contemplated by the Constitution is distinctly presented, in which the Legislature deems that a public benefit is to be effected by depriving the citizen of his liberty or property without due process of law.

2. That even if such a deprivation could be justified in any case, the public good in this case does not in any sense require it, because

(*a.*) Those intended to be benefitted *are not the public*, but only one class of the public who are seeking a business advantage over another and much larger class, which is equally entitled to protection.

(*b.*) Even if such class is held to constitute the public, it is not entitled to the suppression of *all* restriction upon competition. Because such a suppression would be a plain and oppressive violation of the equal rights of the other class, inasmuch as it would compel the latter to serve the former by labour and property without just compensation.

(*c.*) The legislation in question is not necessary, even if it is admissible. The complete suppression of all the restriction upon competition to which the public has a right to object, is already effectually provided for by full and careful Congressional legislation, in which no defect or insufficiency can be pointed out; so that the further suppression now proposed only extends to those restrictions, just and reasonable in themselves, to which the public have not a right to object. And even without that or any legislation, it would be utterly impossible under existing facts, notorious and undisputed, for railway companies to restrict competition to a degree that would result in any injury to the public.

(*d.*) That if all restrictions upon competition were prohibited, the result, instead of a public advantage, would be a public calamity. And would injure rather than benefit the very class in whose behalf it is contended for.

3. That even if it were admitted that further legislation against restrictions upon competition was both constitutional and necessary, the provisions of this act, in forbidding all such restrictions, are not justly adapted to the only end that is admissible on

the score of the public good—the maintenance of just and reasonable rates. But must result in an infringement upon the liberty and property of the defendants, to a degree far beyond what is necessary to that end, and in no way conducive to it.

And it is respectfully submitted that these propositions are undeniable; that they are the result of the whole course of decision in this Court upon the subject, and are supported by a great weight of authority elsewhere.

XIII.—The hesitation with which the Court ordinarily approaches the question of the constitutional validity of an Act of Congress, is in this case much relieved.

In most instances of that sort the intention of Congress which must be overruled if a statute is pronounced invalid, is clear and certain. Here it is the mistake or inadvertence of the legislative body which has employed language that is uncertain, and which, in the construction that has been deemed unavoidable, involves consequences that are conceded to be unjust.

It is, therefore, not the intention of Congress that is to be defeated, but its mistake, which has expressed a conclusion it could not have intended, and which one of its Houses expressly refused to adopt.

XIV.—It can hardly be necessary to remark, in conclusion, that no provisions of the Constitution, nor all its other provisions put together, are so important to be maintained, as its guarantees of life, liberty and property; for it is only to give effect to those guarantees that the Constitution itself exists. The whole framework of government, in all its departments and dependencies, has but this one pur-

pose, that life, liberty and property, in the broad definition that has been given to those words, shall be safe.

The defense of these cardinal rights, which underlie all others known to public law, is the greatest of all the functions of this highest of all tribunals, and is committed in the last resort to its hands alone. It was parliamentary oppression and folly that brought this Court into existence. Having driven the founders of our Constitution into rebellion, it taught them likewise that in a Republican system of government the fundamental rights of the citizens must be placed beyond the reach even of the representatives of the people. And this court was therefore established, to stand as a bulwark between the people and their own unadvised action, and uninstructed will.

These great guarantees of the Constitution can never be overthrown by general assault. If they are broken down, it must be by gradual approaches, in which each false and dangerous step becomes the precedent for another. And if they are to be maintained, it can only be by a timely and resolute resistance against the first attacks.

Such attacks, in various quarters and in various forms, have commenced, and until the insane delusion that prompts them has spent its force, they may be expected to continue.

In dealing with this subject the words of Chief Justice MARSHALL are appropriate: "In the argument we have been admonished of the jealousy with which the States of the Union view a revising power entrusted by the Constitution and laws of the United States to this tribunal. To observations of this character the answer uniformly given has been that the course of the judicial department is marked out by law. We must tread the direct and narrow path prescribed for us. As this Court has never grasped at ungranted jurisdiction, so will it never, we trust, shrink from the exercise of that which is conferred upon us."

Tenth Point.—Whatever the merits of the agreement in question may be, no case for an injunction is presented.

I.—It has already been pointed out that no jurisdiction whatever exists under which this suit can be entertained, unless it is conferred by the Interstate Commerce Act, or the Anti-Trust Act.

And that no such jurisdiction is given by the Interstate Commerce Act

II.—While the Anti-Trust Act does confer upon the Federal courts the "jurisdiction to prevent and restrain violations of this act;" and makes it the duties of district attorneys to "institute proceedings in equity to prevent and restrain such violations;" and provides that the petition in such proceedings may pray "that such violation may be enjoined or otherwise prohibited;" these provisions do not authorize the decree sought in the present case, even assuming that the Agreement violates that Act.

1. The jurisdiction thus conferred is special, and outside of the ordinary power of the Court, and applies only to violations of the Act by which it is given. Such a violation must therefore be charged in the bill. The Act requires that the petition shall "*set forth the case*," and pray that "*such violation*" shall be enjoined. And that would be equally required by the general rules of procedure.

But the bill contains no allusion to the Anti-Trust Act, charges no violation of it, and makes no appeal to the jurisdiction it confers It proceeds upon the general ground that the Agreement is unlawful because it is in restraint of trade and com-

merce, restricts free competition, and provides for "pooling," and prays that it may therefore be declared unlawful, and enjoined.

The amendment to the bill states that the Interstate Commerce Commission applied to the Attorney-General to direct the institution of proceedings, on the ground that the agreement is in violation of the Interstate Commerce Act. And that the Attorney-General thereupon ordered suit to be commenced on that ground, and also on the ground that it violates the Anti-Trust Act. This statement does not supply the want of proper averments of the cause of action in the bill. Nor is any such method of double headed procedure authorized by either Act.

2. The provisions of the Anti-Trust Act giving the power to grant injunctions against its violation, do not dispense with the general rules of law regulating that remedy. The language implies that it is to be administered upon the settled principles always applied to it, and upon the facts always held indispensable, because no other rule or basis of proceeding is provided in the Act.

If it had been intended to invest the courts not merely with the authority to grant injunctions, but to do it upon a case to which injunctions are never applicable by the rules of law, language to that effect would have been employed, and the new ground on which the remedy was to be granted would have been prescribed.

3. In order to the granting of an injunction, it must appear that the unlawful act enjoined is not only unlawful, but such as is about to occasion an injury to the complainant, that is irreparable at law. In the present case the Government, as such, is in no danger of sustaining injury, and has no interest whatever in the matter. All the injury that can in

any event occur from the operation of this Agreement, if it is assumed to be injurious at all, will be to such shippers of freight as may hereafter be affected by it, by being overcharged. If it be held that under the terms of the Act the Government may intervene by suit upon the ground of the injury that may be occasioned to such parties, then, to justify an injunction, the special case of some party must be set forth, who shall appear to be in danger of an irreparable injury.

Such a case could only arise under very special circumstances, because no injury to any shipper, by excess of charge, can be easily conceived, for which the remedy under the provisions of the 7th Section of the Anti-Trust Act (if that Act be applicable), whereby he may recover threefold damages, and likewise the various remedies given by the Interstate Commerce Act, are not ample and complete. But if a case that justifies an injunction has in fact arisen, it should be stated in the bill.

In the case of the *Texas Pacific Railroad Co.*, before cited, this Court remarks with severity upon the theory of the administration of justice through the Commission, by proclamation, instead of by the adjudication of actual cases as they occur. The opinion is most instructive and pertinent. The Court intimates very plainly that cases must be considered on their own circumstances when they arise, and cannot be dealt with by vague general orders in advance, in which the circumstances that give character to cases are disregarded, and the just and unjust are blended together in a common misapplication.

Eleventh Point.—Even though the authority to make the decree sought exists, the bill is insufficient to invoke it.

It has already been shown that it is not based by

its averments on the Anti-Trust Act. That is equally true in respect to the Interstate Commerce Act.

If judged by its allegations, it sets forth only the charge that the Agreement is void at common law. But as its effect is now claimed on the part of the Government, it avers not only this, but that the Agreement violates both these statutes.

If the bill is allowed to have a scope by construction or inference that its language does not warrant, so that a penal statute may thus be proceeded upon without disclosing that cause of action in the complaint, then the bill is fatally defective for misjoinder and multifariousness. For it then sets up three distinct and different causes of action, two of which arise under separate statutes, each creating a right of action that would not otherwise exist, and claimed to confer a special jurisdiction to enforce it. And the third arises, if at all, at common law, and appeals for its redress to the general jurisdiction of the Court.

"By multifariousness in a bill is meant the improperly joining in one bill distinct and independent matters, and thereby confounding them; as, for example, the uniting in one bill of several matters perfectly distinct and unconnected, against one defendant."

Story's Eq. Pleading, sec. 271.

"To support the objection of multifariousness because the bill contains different causes of suit against the same person, two things must concur: first, the different grounds of suit must be wholly distinct; secondly, each ground must be sufficient, as stated, to sustain a bill."

Ib., sec. 271*a*—*note.*

"Perhaps in strictness of language it would be more correct to call it a misjoinder, where different and distinct claims are mixed up in the same bill against the same defendant."

Ib., note to sec. 271.

Campbell v. *Mackay*, 1 *Myl. & Cr.*, 618.

This objection is taken in the answers.

Record, fols. 272–275.

Ib., fols. 380–383.

It could not have been taken by demurrer, because it is not apparent on the face of the bill, the form of which, in respect to its alleged common law cause of action, is sufficient.

An ambiguous bill will not receive a construction that will make it multifarious, where it can be avoided. But if such construction is claimed for it by the complainant and is admitted, the objection arises and is fatal.

This defect is not technical merely. It goes to the substance of the bill, introduces inconvenience and confusion of procedure, and is a serious injustice and disadvantage to the defendants.

Orderly procedure, in accordance with established rules, is essential to justice.

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